No. 82-46

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CATHOLIC BISHOP OF CHICAGO

Petitioner,

v.

F.E.L. PUBLICATIONS, LTD.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining that respondent's Annual Copy License was not a copyright misuse or a violation of the antitrust laws and did not bar respondent's claims of copyright infringement.

TABLE OF CONTENTS

	PAGE(S)
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT and REASONS FOR DENYING THE WRIT OF CERTIORARI	10
I. Since The Court Of Appeals Found No Copyright Misuse, The Decision Below Does Not Involve The Issue Of Whether Misuse Is A Defense To Copyright Infringement.	10
II. The Decision Below Is Not In Dispute With This Court's Decisions In Loew's, Paramount Pictures, And Zenith And Is Consistent With Broadcast Music.	11
III. The Appellate Court's Refusal To Accept The Bishop's Unsupported Interpretation Of An Isolated Clause In The ACL Is Not A Question Of Federal Law Or National Importance Appropriate For Supreme Court Review.	14
IV. The Court Of Appeals' Decision On The Rule Of Reason Is Firmly Based On Undisputed Facts	16
CONCLUSION	18

TABLE OF AUTHORITIES

	PAGE(S)
Arizona v. Maricopa County Medical Society, 50 U.S.L.W. 4687 (June 18, 1982)	12
Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc., 339 U.S. 827 (1950)	13
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)	7, 11, 13
Columbia Broadcasting System, Inc., v. American Society of Composers, Authors and Publishers, et al., 620 F.2d 930, 939 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981)	17
F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 199 U.S.P.Q. 8[illegible] (N.D. Ill. 1978)	5
F.E.L. Publications, Ltd. v. National Conference of Catholic Bishops, 466 F. Supp. 1034, 1039 (N.D. Ill. 1978)	2
Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902)	16
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)	16
Fountain v. Filson, 336 U.S. 681 (1949)	17
Harms, Inc. v. Sansom Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958), aff'd, 267 F.2d 494 (3d Cir. 1959)	10
M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)	10
Missouri Pacific Railroad Co. v. National Milling Co., Inc., 409 F.2d 882, 885 (3d Cir. 1969)	18
Morton Salt v. G.S. Suppiger Co., 314 U.S. 488 (1942)	10
United States v. Great Northern Railway Co., 337 F.2d 243, 249 (8th Cir. 1964)	18

	PAGE(S)
United States v. Loew's, Inc., 371 U.S. 38 (1962) .	7, 11, 12, 13
United States v. Paramount Pictures, 334 U.S. 131 (1948)	7, 11, 12, 13
Weit v. Continental Illinois National Bank & Trust Co., 641 F.2d 457, 464 (7th Cir. 1981)	16
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	12, 13
Statutes And Rules	
15 U.S.C. § 1125(a)	4
Supreme Court Rule 28.1	1
U.S. Constitution, Article I §8	12
Treatises	
6 Moore's Federal Practice ¶ 56.12 at 56-331 (2d ed. 1982)	18

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STATEMENT OF THE CASE

Respondent F.E.L. Publications Ltd. (FEL) is a music publisher specializing in marketing religious music, particularly music directed to Catholic parishes.[1] FEL acquired approximately 1400 music copyrights from individual composers, who assigned all of their rights to FEL in exchange for royalties based on sales (A. 1a, 2a).[2] The copyrights involved in this case cover compilations of individual songs for which individual copyrights are also claimed in the words, music, or both.

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[1] Pursuant to Supreme Court Rule 28.1, there are no parent, subsidiary, or affiliate corporations to FEL. There are some common officers and shareholders between FEL and Copyright Sharing Corporation of Beverly Hills, California.

[2] All citations to Petitioner's appendix are labeled (A.), and references to the Petition are labeled (P.).

FEL's Annual Copy License (ACL) was instituted in 1972. The ACL was offered to solve a growing problem in Catholic churches throughout the United States commonly known in the religious music industry and among church leaders[3]—illegal copying of copyrighted music by clerics and lay groups celebrating masses in churches. During this time, folk-style religious music was popular in Catholic churches, and FEL was one of several publishers concentrating on this style of music.

Prior to 1972, the music was primarily supplied to churches in the form of printed publications. FEL concluded that illegal copying was occurring in part due to the churches' dissatisfaction with printed publications. Many churches were then beginning to compile their own "custom hymnals" containing only the music each congregation desired. It was difficult, if not impossible, to develop such a hymnal because the music usually originated from multiple publishers, each publishing a desired song or songs in combination with other songs. In addition, the churches' selection of songs and the necessary number of copies of each song frequently changed throughout a single year. These problems combined to make printed publications impractical for some churches.

The ACL was an attempt to accommodate the churches' desires inexpensively and on a basis that was also fair and equitable for FEL. The ACL permitted churches to select one or more of FEL's 1400 songs and make unlimited copies of those songs for one year upon payment of a $100 fee. This option was offered to the public in addition to the existing printed publications and to another type of license, called a One

[3] Illegal copying, not limited to the music of any particular publisher or being committed by any particular parish, was generally known to FEL, other publishers, and the National Conference of Catholic Bishops, which issued two statements to U. S. Catholic institutions condemning copyright infringement. See F.E.L. Publications, Ltd. v. National Conference of Catholic Bishops, 466 F. Supp. 1034, 1039 (N.D. Ill. 1978).

Time Usage License, which required payment of $.02 per song per copy with a minimum order of $10 and required destruction of the copies following the single occasion (for example, a wedding or other special event) for which the songs were used. At times during the period 1972-1976 preceding the filing of this suit by FEL, FEL's printed hymnals and songbooks containing various collections of its most popular songs sold for as low as 39¢ per hymnal and 19¢ per songbook if ordered in quantity. FEL also sold sheet music containing individual songs for as low as $1 per song, and cards containing eight often-requested songs for 25¢ to 50¢ each depending on quantity (A. 2a).[4]

The ACL legalized copying and appealed primarily to the "heavy users" of FEL's music, the churches that used more than a few of FEL's songs or a large number of copies or that simply desired the flexibility provided by the license to change songs and to decide on Saturday afternoon which songs were to be used for a Sunday mass. The license freed FEL and the churches from the administrative problems and costs involved in negotiating fees for each song to be used and the number of copies to be made. The license also substantially reduced the problem, for both FEL and the church, of policing copy licenses in parishes spread throughout the country and monitoring the

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[4] Thus, the contrived example listed in petitioner's brief (P. 20) of 500 copies of sheet music for one song at $1 per song, or $500, is neither the least expensive option for a church nor does it bear any relation to a realistic purchasing situation. If a church wanted 500 permanent copies of a song, it could buy 500 songbooks at 19¢ each and spend $95. A more realistic example would be a request for 500 copies of 20 different songs. Even at 2¢ per song per copy, a price to which the Bishop does not seem to object, the copies would cost $200, or double the price of the ACL.

FEL also offered a commercial reprint license to competing publishers for commercial reprinting of preselected songs in limited quantities for inclusion in permanent printed hymnals and songbooks. This license was designed to meet the particular needs of publishers which did not require the flexibility provided by the ACL.

number of copies made, because the churches were permitted to copy any or all of FEL's songs in unlimited quantities. These benefits were expressly recognized by the court of appeals (A. 10a, 11a), which noted:

> "The ACL was not developed in a vacuum; it grew out of a history of copyright infringements and was designed to protect musical copyrights in a market where infringement is not easy to detect and harder to prevent." (A. 11a)

While 30 of the 447 parishes in the Chicago Archdiocese found the ACL useful and entered into licenses with FEL, an informal survey conducted by FEL in 1976 revealed that approximately 100 Chicago area parishes had copied FEL's music without permission and with disregard for various options of copy licenses or printed publications offered by FEL. Copying had continued despite FEL's distribution of four mailers to each of the Chicago parishes and other Catholic institutions throughout the U.S. during the period 1972-1976 offering FEL's products and warning against copyright infringement in general, and despite notices of infringement sent before filing suit to the approximately 100 Chicago area churches known to be infringing. Consequently, FEL filed this action on September 20, 1976 against one of its biggest customers, the Catholic Bishop of Chicago (Bishop), claiming copyright infringement and unfair competition under the Lanham Act, 15 U.S.C. §1125(a), and under the common law of Illinois.

On September 29, 1976, FEL filed a motion for a temporary restraining order and preliminary injunction seeking to enjoin alleged continuing infringement of the copyrighted works involved in this suit. At a hearing on this motion on September 30, 1976, the Bishop voluntarily agreed to remove all materials containing unauthorized copies of FEL songs from the parishes and other institutions comprising the Archdiocese and deliver them to FEL's counsel, and FEL withdrew its motion. Purportedly pursuant to this agreement, the Bishop also circul. ed letters to its parishes ordering a ban on the

singing of FEL music and requiring the collection of all FEL works, including lawfully printed and licensed publications, and lawful sound recordings. The letters stated that these steps were necessary to avoid "penalties imposed on the Archdiocese, its parishes and personnel by the Federal Court". Copies of these letters were also circulated to fellow bishops in the U.S. The collected materials, comprising approximately 500 boxes containing approximately 225,000 songsheets or songbooks including unauthorized copies of FEL songs, were delivered to FEL's counsel's offices. Subsequent examination of these materials revealed that approximately 160,000 of the 225,000 songsheets and songbooks contained at least one FEL song which was copied without authority. In all, over *1.5 million* unauthorized copies of FEL songs were collected from the Bishop (A. 3a).[5]

Upon learning of the letters and receiving the lawful materials, as well as the unauthorized materials, FEL filed a Motion for Clarification of the September 30, 1976 Agreement. Thereafter, the Bishop agreed to take back and store at its own expense the lawfully printed publications and sound recordings. In a Memorandum Opinion dated March 29, 1977 District Judge Kirkland[6] strongly condemned the misleading nature of the Bishop's letters and the unnecessary collection of lawful copies of FEL materials from the parishes. But, the parishes continue to be deprived of their lawful copies of FEL songs, and the purchase and singing of FEL songs is still banned in Chicago.

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[5] Unauthorized copies of FEL's music were not the only infringements uncovered in the Bishop's material. Numerous popular songs, such as "Bridge Over Troubled Waters" by Simon and Garfunkel and "Blowin' In The Wind" by Peter, Paul & Mary are also contained in many of these materials, apparently without permission of the copyright owners.

[6] F.E.L. Publications, Ltd. v. Bishop of Chicago, 199 U.S.P.Q. 85 (N.D. Ill. 1978). This case was transferred to District Judge Leighton upon Judge Kirkland's retirement.

The Bishop filed its first Answer with affirmative defenses and a Counterclaim on January 12, 1977. Certain of the affirmative defenses and the Counterclaim alleged copyright misuse and violation of the Clayton and Sherman Antitrust Acts due to FEL's offering of the ACL.

On August 11, 1977, the district court entered a memorandum Opinion and Order dismissing the Clayton Act portions of defendant's Counterclaim and dismissing certain other Affirmative Defenses.

In another Memorandum Opinion and Order dated April 28, 1978, the district court granted the Bishop's motion for partial summary judgment dismissing from the case the 22 parishes that had obtained licenses and 9 parishes that purchased releases from FEL,[7] and also the 149 parishes that apparently made no copies of FEL's works. Summary judgment was denied as to the 122 parishes which copied FEL's works for more than three years before this suit was filed, but continued to use the copies thereafter. The Bishop made no effort to include in its motion the remaining 146 parishes which copied FEL's works within the three years immediately prior to the inception of this case.

The parties subsequently filed cross motions for summary judgment regarding copyright infringement, antitrust violations, and copyright misuse. Combined memoranda addressing both parties' motions were filed, and a combined oral argument was heard. On May 23, 1980, the district court denied FEL's motion for summary judgment as to the liability of the Bishop for copyright infringement and on the antitrust counterclaim. On January 9, 1981 the district court granted the Bishop's motion for summary judgment on the copyright misuse and antitrust claims and dismissed the entire complaint. The affidavits, depositions and other discovery filed in support of

[7] FEL asserted no claims against parishes that had purchased licenses or releases and did not oppose this portion of the Bishop's motion.

both parties' motions disclosed, among other things, all of FEL's products and marketing practices, as well as the Bishop's conduct and the conduct of his agents in connection with the use of FEL's music. The memoranda filed in connection with both FEL's motion and the Bishop's motion argued the legality of the ACL under the Sherman Act and, while both parties contended that the issue was proper for summary judgment, the sets of undisputed facts relied upon and the legal conclusions resulting from those facts differed.

On appeal, the Seventh Circuit Court of Appeals unanimously reversed the order of the district court and remanded for proceedings consistent with its opinion. The court of appeals found no basis for the district court's conclusion that the ACL licensed not-for-profit performances exempted from the copyright owner's exclusive rights under the 1909 Copyright Act. The appellate court agreed "that the ACL limits the use of F.E.L. songs to not-for-profit performances", but it disagreed with the "legal consequences of this fact" and held that the ACL "does not license the performance itself" (A. 6a, 7a).

The court of appeals also found that the ACL was not illegal under the Sherman Act. The court was not persuaded by the Bishop's attempt to bring the ACL within the holdings of *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), and *United States v. Paramount Pictures*, 334 U.S. 131 (1948), by labeling the ACL a "tying contract". Rather, the court found that the "ACL is more appropriately analyzed as a blanket license under the precedent established in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)", where the Supreme Court "scrutinized a license so similar to the ACL" that the court of appeals was unable "to see how the instant case can be distinguished" (A. 10a).

In following *Broadcast Music*, the court of appeals found that the ACL was "not a combination of individual song licenses" but instead "a unique product 'composed of the individual compositions plus the aggregating service [such

that] the whole is truly greater than the sum of its parts' " (A. 11a, 12a). Noting that the record disclosed no tying or tied products, the court of appeals found that the ACL is "a singular commodity" (A. 12a) and concluded "there can be little doubt that the ACL is not a per se violation of the Sherman Act" (A. 12a).

The court also found that the substantial discovery generated in the case created a record which "fully disclosed" (A. 13a) the characteristics of the alternatives to the ACL offered by FEL, and warranted an evaluation of the ACL under the rule of reason. The court even considered "the potential for coercion [in the form of price fixing] from the ACL", a theory not even espoused by the Bishop, but concluded as a matter of law that the "ACL has no anti-competitive effects" and is not a violation of the antitrust laws (A. 15a).

Finally, the court of appeals found error in the district court's dismissal of the Lanham Act count and determined that reconsideration of the dismissed pendent state law counts was appropriate. The Bishop does not seek review of this portion of the decision.

A petition for rehearing and suggestion for rehearing en banc filed by the Bishop was unanimously denied by the Seventh Circuit Court of Appeals on May 17, 1982.

SUMMARY OF ARGUMENT

The first and primary reason given by the Bishop for granting certiorari in this case centers on whether copyright misuse is a complete defense to copyright infringement. This issue was not reached by the court of appeals, because that court found no misuse and because the district court has not yet entered an order finding copyright infringement.

There is no copyright misuse because the ACL is a single, unique product and a blanket license. It is not a mandatory package license, as claimed by the Bishop, because it is not mandatory. Persons desiring FEL's music can choose from various alternatives to the ACL, including a per song license and printed publications containing one or a combination of FEL's most popular songs.

The ACL does not license not-for-profit performances or public domain material. The Bishop's arguments rest on his own interpretation of isolated clauses in the ACL which are unsupported by the undisputed facts in the record and which have already been interpreted by the court of appeals unanimously against the Bishop. There is no question of federal law or national importance in interpreting clauses in the ACL.

The court of appeals conclusion that the ACL does not violate the rule of reason is based on undisputed facts. Rather, the Bishop merely wants to make a "full record" and "elaborate inquiry into the reasonableness of the challenged practice" (P. 21) but fails to indicate what, if anything, would be added to the record. In fact, there is no evidence that would change the finding that the ACL has no anticompetitive effects. There is, therefore, no violation of the Bishop's right to a jury trial.

There are no valid reasons for granting the writ of certiorari. All of the reasons, arguments, and cases cited by the Bishop in his Petition were considered by the court below, except the jury trial argument which, as previously described, lacks merit.

The Petition for Writ of Certiorari should be denied.

ARGUMENT

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Since The Court Of Appeals Found No Copyright Misuse, The Decision Below Does Not Involve The Issue Of Whether Misuse Is A Defense To Copyright Infringement.

The Bishop claims that the decision below provides this Court with an opportunity to resolve the alleged confusion in the lower courts as to whether the copyright misuse doctrine is a complete defense to a copyright infringement action. However, the court of appeals did not find copyright misuse, a threshold determination for the Bishop's alleged issue. Moreover, the district court has not yet entered an order finding copyright infringement. Therefore, the Bishop's issue is not present and a resolution of the alleged confusion in the lower courts would have no effect on the case at bar.

Petitioner refers to *Morton Salt v. G.S. Suppiger Co.*, 314 U.S. 488 (1942), and a number of lower court decisions examining various forms of misuse or unclean hands, all very different from the alleged misconduct of FEL. In some of these cases, such as *Hurms, Inc. v. Sansom Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd*, 267 F.2d 494 (3d Cir. 1959), the courts merely found that there was insufficient evidence to raise the misuse defense, or that the evidence presented was collateral to the parties in suit, and did not avoid infringement claims. In the unique case of *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), the copyright owner was denied relief because to grant relief "would serve to continue the unlawful practices here condemned . . ." 80 F. Supp. at 850. Aside from this type of aberration, there is no real dispute among the lower courts because the evidence of copyright misuse presented in these cases has generally not risen to the level where a court of equity would deny relief to a copyright owner.

The Bishop premises his entire argument for certiorari with this alleged confusion and with the astounding accusation that the Seventh Circuit Court of Appeals is guilty of a copyright "bias" (P. 9). Nevertheless, the substance of his argument rests on his view of selected facts which have been distorted to fit this case into the holdings of several prior decisions of this Court, and also on an unsuccessful attempt to distinguish this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

II. The Decision Below Is Not In Dispute With This Court's Decisions In Loew's, Paramount Pictures, And Zenith And Is Consistent With Broadcast Music.

The Bishop's initial dispute centers on whether the ACL is a blanket license, as found by the court of appeals, or a tying contract—mandatory package license (the Bishop apparently uses these terms interchangeably). The court of appeals determination rested on conclusions drawn from undisputed facts concerning the ACL. The Bishop's characterization is based on an argument that the court of appeals "ignored" and "overlooked" certain facts (P. 12). Reexamination of these facts, which in reality were neither "ignored" nor "overlooked", should not be a Supreme Court exercise.

In an attempt to bring this case within the holdings of *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), and *United States v. Paramount Pictures*, 334 U.S. 131 (1948), the Bishop labels the ACL as a mandatory package license despite the "substantial similarity" (A. 12a) between the ACL and the blanket license in *Broadcast Music*.[8] This label is based on the Bishop's "bald assertion that some songs are more popular than others" (A. 12a), and from FEL's refusal to grant the particu-

[8] Contrary to the Bishop's assertion that the Seventh Circuit did not mention Loew's or discuss Paramount Pictures (P. 7), the court of appeals' decision does refer to Paramount Pictures (A. 9a), and both cases were argued extensively in the appeal briefs and at oral argument.

lar type of license allegedly desired by the Bishop. That some FEL songs are more popular than others is hardly a startling revelation; any songbook or hymnal contains some popular and some less popular songs, and the same is true with ASCAP's and BMI's licenses. As noted by the court of appeals, "a publisher selling a hymnal is not guilty of violating the antitrust laws because he does not offer for sale each song separately" (A. 12a, n. 14). FEL's refusal to grant a per song license other than its One Time Usage License, or to provide permanent copies of its music other than hymnals, songbooks, songcards and sheet music, does not make the ACL illegal or unreasonable. "A copyright owner is not required to market its copyrights in a form most convenient to its customers" (A. 14a).

Unlike the circumstances in *Loew's* and *Paramount Pictures,* involving not a blanket license, but a practice whereby licensees could not obtain the more popular films without paying for the less popular films, the ACL is a "unique product" (A. 11a) and "a singular commodity" (A. 12a) offering flexibility and other advantages unavailable in a single song license. The ACL was offered by FEL *in addition* to its other means for providing music to churches. Thus, it would not "promote the progress of the useful art", as mandated by Article I §8 of the United States Constitution, to strike down this additional means for making copyrighted music available to the public.[9]

The Bishop's reliance on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), is similarly misplaced. This is not a situation as in *Zenith* where royalties are being

[9] While the Bishop also cites this Court's recent decision in Arizona v. Maricopa County Medical Society, 50 U.S.L.W. 4687 (June 18, 1982), he fails to recognize or point out this Court's most recent approval of a business practice referred to in that same case similar to a blanket license. A medical clinic's offer of complete medical coverage for a flat fee was termed "perfectly proper" in that decision. 50 U.S.L.W. at 4693.

paid on sales of items not embodying the licensed rights. Rather, this is more like the situation recognized by the *Zenith* court and by this Court's decision in *Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), in which the licensee pays a lump sum for "the privilege to use any or all" of the copyrights. The licensee "cannot complain that he must pay royalties if he chooses to use none of them". 395 U.S. at 138-139.

Thus, there is no conflict between the court of appeals' decision and *Loew's, Paramount Pictures,* and *Zenith.*

The Bishop's attempt to distinguish *Broadcast Music* from the present case is not only unsuccessful, but it also demonstrates the Bishop's characteristic laxity with the facts.

First, *Broadcast Music* did not hold that copying rights can be negotiated individually and in advance; the footnote in that decision cited by the Bishop (n. 37) refers to dramatic, sheet music, recording, and synchronization rights.

Second, that FEL is the copyright owner and not a licensing organization like ASCAP and BMI further removes the ACL from the antitrust laws and the price-fixing dangers of a joint license. The Bishop's reference to Justice Stevens' comments in dissent about "the illegality of the blanket-only policy if ASCAP and BMI were the exclusive sources of all licenses" (441 U.S. at 28) disregards the undisputed facts that FEL, owner of 1400 copyrights, is one of at least 20 companies in the United States which license churches to copy at least 10,000 different songs, and at least 8 of these publishers are larger than FEL ($400,000 annual gross revenue) in total revenues. In contrast, "almost every domestic copyrighted composition is in the repertory either of ASCAP . . . or of BMI". 441 U.S. at 5.

Third, the ASCAP and BMI consent decrees did not require those organizations to permit negotiation directly with writers and composers or to offer per use licenses, as the Bishop

contends, but required those organizations to permit licensing directly with the copyright owners. Here, FEL is the copyright owner, and the licensees deal directly with FEL.

The Bishop's alleged concern for the supposedly anticompetitive impact of the ACL is not only unbelievable but again disregards the facts. The Bishop did not find the ACL "anticompetitive" until it was sued for copyright infringement and was forced to explain over a million unauthorized copies of songs. The alleged effect of the ACL on 22,000 Catholic parishes ignores the facts that FEL never had more than 1500 ACL licensees at one time, and the remaining parishes either used the One Time Usage License or printed versions of FEL's music, or did without FEL's music altogether, as the Chicago Archdiocese is apparently doing now pursuant to order of the former Archbishop. The effect of the court of appeals decision on FEL's competitors is likely to be pro-competitive, because more competitors may be stimulated to offer a blanket copy license and thereby make their music more available to the public.[10] The Bishop's purported concern that the ACL will somehow reduce royalties to FEL's composers rings unconvincingly coming from a party which has deprived composers of hundreds of thousands of dollars in royalties through unauthorized copying.

III. The Appellate Court's Refusal To Accept The Bishop's Unsupported Interpretation Of An Isolated Clause In The ACL Is Not A Question Of Federal Law Or National Importance Appropriate For Supreme Court Review.

The Bishop also argues that the ACL licenses not-for-profit performances exempted by the Copyright Act. This ground was not given as a reason for granting a writ of certiorari, apparently in recognition of its inappropriateness for Supreme Court review.

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[10] The Bishop asserts that FEL is the only publisher not to offer a per-song/per-copy license for the life of the copy. In fact, however, a directory published by an official Catholic organization offered by FEL to supplement the record, which was not considered by the appellate court (A. 18a, n. 20), shows the Bishop's claim to be untrue.

The Bishop's contention is based solely on its interpretation of an isolated clause of the license agreement. There was no evidence that any fee was exacted for performance of the music in church, and it was undisputed that with or without the ACL, a congregation could perform (sing) FEL's music from legal printed publications or from memory. Thus, a church's performance rights were unaffected by the ACL, and "its restrictions are well within the rights afforded a copyright owner by the Copyright Act of 1909" (A. 8a).

The Bishop's complaint that a licensee must renew the ACL or destroy copies at the end of the license term disregards the court of appeals' finding that "the ACL grants not merely the right to copy, but the right to continue to use the copies by distributing (publishing) the copies to the congregation during church services" (A. 7a). The Bishop's insensitivity to the realities of publishing is especially noticeable here. On the one hand, the Bishop apparently expects FEL to reduce its $100 blanket license fee, upon which it heavily depends for its gross revenues, to a lower per song per copy fee. On the other hand, the Bishop expects FEL to make its entire repertoire of songs, already available for one year at the relatively low price of $100, available for use on a *permanent* basis under that same license. The result would not only eliminate the sale of printed publications, but eliminate the economic incentive for FEL to remain in business, as well.

The Bishop's claim that FEL exacts royalties for public domain material is another factual dispute grounded entirely upon his own interpretation of an isolated clause in the ACL relating not to the license fee or the rights granted under the license, but to the composer/author and copyright acknowledgments. The Bishop offered, and the court of appeals found, "no evidence that F.E.L. exacted a fee for words in the public domain" (A. 9a n. 9).

There is no question of federal law or national importance in interpreting the language of the ACL, as the Bishop requests this Court to do.

IV. The Court Of Appeals' Decision On The Rule Of Reason Is Firmly Based On Undisputed Facts.

The Bishop claims that he has been deprived of a jury trial on the antitrust issues due to the court of appeals' consideration of the ACL under the rule of reason. The same type of claim is made by nearly every party against whom summary judgment is rendered, but there is no infringement of the right to a jury trial where there are no triable issues of material fact or "significant probative evidence tending to support" the claim. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902). That this case involves antitrust issues has no bearing on the propriety of summary judgment, because "no greater caution or concern for litigant's rights is required in the anti-trust context than in other substantive areas of Federal Court litigation". *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981).

The parties' motions for summary judgment were filed following four years of discovery and were decided after discovery had been closed. The Bishop does not now contend that he was deprived of an opportunity to ascertain additional facts. Instead, the Bishop merely contends that he did not offer some unspecified evidence to show how bad the ACL is, and that it should also be given an opportunity to argue that the ACL is illegal under the rule of reason, as well as being a per se violation.

The Bishop's complaint boils down to the assertions that the annual $100 price of the ACL is too high for churches that want to maintain permanent custom-made hymnals and FEL's other products are too inconvenient, but "neither the expense nor the inconvenience of these alternatives makes them unreasonable" (A. 14a). Nothing in the antitrust laws requires FEL to conduct its business in an uneconomical way or according to a particular customer's preference.

No amount of evidence showing that the ACL is unsatisfactory to the preferences of the Bishop would affect the outcome of the case since, as the court of appeals found, the ACL "has no anti-competitive effects" (A. 15a). Without anti-competitive effects, the balancing of pro- and anti-competitive effects under the rule of reason need not be undertaken. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, et al.*, 620 F.2d 930, 939 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

The Bishop's argument that he has been deprived of an opportunity to argue the rule of reason and that the court of appeals decided the case on a "new theory" lacks merit. Throughout the two cross motions for summary judgment in the district court and on appeal the parties have vigorously argued the validity of the ACL under the antitrust laws. The Bishop offered evidence in the district court upon which he relied in the appellate court, and upon which he still relies, claiming to show that other publishers have different types of licenses and that there is allegedly no "market necessity" for the ACL (P. 4, 14). This type of argument is only consistent with a rule of reason argument.

A rule of reason analysis is not a "new theory" under *Fountain v. Filson*, 336 U.S. 681 (1949). That case involved a complaint alleging the existence of a resulting trust, but the appellate court based its decision on the existence of a personal obligation. The Supreme Court reversed because the losing party in the appellate court had "no occasion in the trial court . . . to dispute the facts material to a claim that a personal obligation existed, . . ." 336 U.S. at 683. Here, in contrast, the alleged antitrust and misuse consequences of the ACL were raised by the Bishop and argued by the parties, and the Bishop hedged his per se argument by also arguing facts material only to a rule of reason analysis. There is nothing unfair and improper about denying the Bishop "a second bite at the same apple".

Finally, that the decision reversed the summary judgment in the Bishop's favor and also found that the ACL was not copyright misuse or violative of the Sherman Act is not improper. Once a party submits issues to the court on a motion for summary judgment, the court has the authority to resolve the issue against the moving party. *Missouri Pacific Railroad Co. v. National Milling Co., Inc.*, 409 F.2d 882, 885 (3d Cir. 1969); 6 *Moore's Federal Practice* ¶ 56.12 at 56-331 (2d ed. 1982). An appellate court has authority to reverse summary judgment in favor of appellee and direct entry of judgment in favor of appellant. *United States v. Great Northern Railway Co.*, 337 F.2d 243, 249 (8th Cir. 1964). In this case, both parties moved for summary judgment, and the appellate court was in the same position as the district court to decide the issues.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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